IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*.

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, ET AL., *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*.

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*.

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*.

No. 76-1624

ILLINOIS BROADCASTING COMPANY, INC., ET AL., *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*.

No. 76-1685

THE POST COMPANY, ET AL., *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS THE POST COMPANY, KNUJ, INC. AND MICKELSON MEDIA, INC.

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OPINIONS BELOW

The opinion of the Court of Appeals is set forth in the Appendix (App. 339-431) and is reported at 555 F.2d 938. Its further opinion on Motion for Stay of Mandate (App. 435-444) is reported at 555 F.2d 968.

JURISDICTION

The judgment of the Court of Appeals was entered March 1, 1977 (App. 432-34). Petitions for a Writ of Certiorari were filed in these consolidated cases on various dates between April 22, and May 27, 1977, and were granted on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1970) and 28 U.S.C. § 2350(a) (1970).

QUESTIONS PRESENTED

1. Whether the First Amendment to the Constitution and the Communications Act of 1934, as amended, require that in the absence of any showing of public harm, newspapers and broadcast stations in the same community which have long been commonly

owned and consistently held to serve the public interest, convenience and necessity must now be broken apart by divestiture.

2. Whether the United States Court of Appeals for the District of Columbia Circuit exceeded its proper role of judicial review when it determined as a matter of policy that irrespective of the number of print and electronic voices within a community, no daily newspaper and broadcast station in that community may be commonly owned.

3. Whether the Court of Appeals exceeded its proper role of judicial review when it remanded to the Federal Communications Commission with instructions to adopt a specific rule rather than to reconsider and reach its own conclusion.

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The First Amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom . . . of the press. . . ."

The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Sections 2(a), 4(i), 4(j), 301, 303 and 309 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 152(a), 154, 301, 303, 307, and 309 are set forth in the Appendix. (App. 27-31).

Section 308 of the Communications Act is set forth in the Addendum hereto.

The relevant provisions of the Administrative Procedure Act of 1946, as amended, 5 U.S.C. § 706, are set forth in the Addendum hereto.

The FCC's Multiple Ownership Rules, 47 C.F.R. §§ 73.35, 73.240 and 73.636 are set forth in the Appendix. (App. 243-263, *as amended*, 337-38).

STATEMENT OF THE CASE

Principally at issue is whether broadcasters as a class should or may be stopped from publishing daily newspapers in their local communities or whether newspaper publishers should or may be disqualified from owning and operating a broadcast station in their community of publication irrespective of whether any evidence suggests that the public interest is disserved thereby. In an Opinion entered March 1, 1977 (App. 339-431) and Judgment (App. 432-434) the United States Court of Appeals for the District of Columbia Circuit (a) invalidated so much of the Federal Communications Commission's Multiple Ownership Rules which provide for divestiture only by co-located broadcast-newspaper combinations which constitute local media monopolies, remanding to the Commission for the adoption of a rule requiring the breakup (absent waiver) of all co-located broadcast-newspaper combinations, and (b) upheld the Commission's prospective proscription of new broadcast-newspaper combinations. The Decision adversely affects more than 120 newspaper-radio combinations and more than 50 newspaper-television combinations in over 130 communities throughout the United States. The chief impact of the court ordered divestiture falls upon small communities with small media operations.[1] It would require owners, wherever located, to sell or trade one or more of their enterprises, or close them down.

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[1] See Appendix B to Petition for Certiorari filed by National Association of Broadcasters.

In 1968, the Commission initiated Docket No. 18110 with the adoption of a *Notice of Proposed Rulemaking*, 33 Fed. Reg. 5315, by which it was proposed to prohibit common ownership of broadcast stations in different broadcast services in the same market; i.e. common ownership of TV-AM, TV-FM or AM-FM stations whose signals overlapped would be prohibited. The proposed rules would have been prospective in nature and no divestiture of existing facilities was contemplated. (App. 135). In 1970, the Commission issued its *First Report and Order*, 22 FCC 2d 306, (App. 33-100), in which it adopted new rules which prospectively prohibited common ownership of VHF television stations and radio stations in the same market. They permitted AM-FM combinations to be formed in the future and provided that applications involving common ownership of UHF television and radio stations would be decided on a case-by-case basis. The new rules did not require divestiture of any existing facilities. Other than future AM-FM and, possibly UHF TV-radio combinations, they prevented any new such combinations from being created and provided that any sale of a VHF station be to a buyer different from that to which commonly owned radio stations in the same market are sold. The rules did not address common ownership of newspaper and broadcast stations. (App. 136).

Simultaneously with the adoption of the new rules, a *Further Notice of Proposed Rulemaking*, 22 FCC 2d 339 (1970), (App. 101-126), was issued in which it was proposed that as to common ownership of broadcast stations and daily newspapers in the same market, divestiture within five years would be required to reduce one party's holdings in any market to one or more daily newspapers or one television broadcast station or one AM-FM combination. The Post Company, KNUJ, Inc.

and Mickelson Media, Inc. all participated in Docket No. 18110 by opposing the proposed rules and divestiture. They contested the statutory and constitutional authority of the Commission to adopt such rules, argued the lack of wisdom in any such rules and concluded that if any divestiture was in fact required, it should only be in those markets where a monopoly exists.[3] The Post Company, KNUJ, Inc. and Mickelson Media, Inc. would not have been subject to divestiture under the Multiple Ownership Rules subsequently adopted by the Commission.

The Post Company is the publisher of *The Post-Register*, a daily newspaper of general circulation published in Idaho Falls, Idaho and is the licensee of Station KIFI-TV (Channel 8) there. Idaho Falls had a 1970 Census population of 35,776. *The Post-Register* has an evening circulation of 19,218, a morning circulation of 4,370 and a Sunday circulation of 21,089.[4] The paper is independent and has been published since 1880. The Post Company has been the licensee of Station KIFI-TV since 1961.[5] Station KIFI-TV places a city grade signal over Idaho Falls and Pocatello, Idaho and is authorized by the Commission to identify with

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[3] Comments of The Post Company in Opposition to Further Notice of Proposed Rulemaking at 2 (May 17, 1971); Comments of Mickelson Media, Inc. and KNUJ, Inc. in Opposition to Further Notice of Proposed Rulemaking at 2 (May 17, 1971); Supplemental Comments of The Post Company (March 15, 1974); Reply Comments of The Post Company (June 17, 1974).

[4] Editor and Publisher Co., Inc., Editor and Publisher Market Guide 1977, 119 (1976).

[5] Effective January 1, 1966, The Post Company was merged into co-owned Eastern Idaho Broadcasting and Television Company, the original licensee of Station KIFI-TV, which then changed its name to The Post Company.

both cities. From the inception of the Television Table of Assignments in 1952, Channel 8 was assigned to Idaho Falls, Idaho. In 1961 the owners of *The Post-Register* had the mettle to bring Idaho Falls the first television station to compete with Station KID-TV which had been in operation since 1953. Indeed, one commercial channel in Idaho Falls and three commercial channels in Pocatello are still idle today. Among other things, The Post Company pointed out to the Commission in its 1971 Comments that in Idaho Falls it was the newspaper which supported and subsidized the television station enabling it to continue to serve the public in the face of substantial financial losses. It was not until 1973 that Station KIFI-TV first earned a profit.

KNUJ, Inc. has been the licensee of Station KNUJ since 1949 and of KNUJ-FM since 1966, both of which are licensed to New Ulm, Minnesota. Mickelson Media, Inc., with substantially the same ownership as KNUJ, Inc., is the publisher of the *New Ulm Journal,* a daily newspaper of general circulation published in New Ulm, Minnesota. New Ulm had a 1970 census population of 13,051. The *Journal* has evening and Sunday circulations of 12,731.[5] Were it not for the pioneering efforts of the *Journal's* owners in radio, New Ulm could well be without the present facilities of Station KNUJ[6] and its FM facilities substantially delayed awaiting some other applicant.

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[5] Editor and Publisher Co., Inc., Editor and Publisher Market Guide, 1977, 228 (1976).

[6] Applications for construction permits for AM stations are granted only if the engineering demonstrates that they "fit" under the Commission's electrical interference standards. Had KNUJ's frequency been applied for elsewhere in that part of the country, it could have been precluded at New Ulm.

Until the 1975 Multiple Ownership Rules were adopted, 50 FCC 2d 1046 (1975), (App. 243-263),[7] the Commission had for many years "encouraged newspaper-broadcast cross-ownership because of the important contribution it believed such owners would make to the development of radio and, later, television broadcasting."[8] After an extensive and complete review of a voluminous record, the Commission adopted a new policy concerning newspaper owners applying for new broadcast facilities but found no record evidence to justify a policy mandating universal divestiture of existing newspaper-broadcast combinations. In a thoroughly reasoned analysis of the record before it, the Commission concluded that the principal argument in favor of divestiture was the increased diversity that a new owner would bring. The Commission was unable to detect, and the record does not support, any abuses emanating from existing broadcast-newspaper co-ownership. In fact, increased diversity was the only public benefit discerned or discernible on this record. On the other hand, the Commission recognized numerous other factors supporting no divestiture.

> We remain no less convinced than before of the importance of diversity, but this is not the only point to consider. Our examination of the situation leads us to conclude that we may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone. There are a number of public interests consequences which form the basis of our concern. Re-

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[7] *Reconsidered*, 53 FCC 2d 589 (1975) (App. 317-338).

[8] *Hearings on Broadcast Oversight Before the Senate Subcomm. on Communications of the Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. (May 10, 1977) (Statement of Richard E. Wiley, Chairman, Federal Communications Commission).

> quiring divestiture could reduce local ownership as well as the involvement of owners in the management as many sales would have to be to outside interests . . . local dislocations are also possible. . . .
>
> In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these [newspaper] parties are determined by factors other than just profit maximation. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public. Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules, divestiture introduces the possibility of disruption for the industry and hardship for individual owners. *Second Report and Order.* (App. 197-98).

With the foregoing, the court of appeals disagreed. It adjudged the diversity factor to be of singular, controlling weight. Accordingly, it reversed the Commission, directing it to adopt new Multiple Ownership Rules mandating universal divestiture, absent special circumstances in individual cases that would warrant a waiver thereof.

Unless the decision of the court of appeals is reversed, The Post Company, KNUJ, Inc. and Mickelson Media, Inc. will be required, absent waiver, to divest themselves of either their broadcast or newspaper properties. Neither ownership group has any broadcast interest other than ones here subject. Both ownership groups have been pioneers in the print and elec-

tronic media of their respective grassroots communities and have provided leadership in public affairs in their respective areas and states. Thus, trading for other media in distant communities or disposing of the particular newspaper is totally foreign to their concern for community involvement.

SUMMARY OF ARGUMENT

The appeals court ruled that in pursuit of First Amendment "values" and Communications Act "policies" newspaper publishers who operate broadcast stations in the same community are required to divest themselves of one medium or the other in order that more speakers may be heard. While recognizing that divestiture would not necessarily increase diversity in all cases, (App. 373), and that diversity was an "elusive concept," (App. 412), the court nonetheless held that because the "First Amendment seeks to further the 'search for truth' " a government policy encouraging the maximum number of searchers will "surely" facilitate that search. (App. 374).

The FCC, in its Rulemaking proceeding, concluded that divestiture was good and adopted rules foreclosing cross-ownership as between broadcast stations and daily newspapers in the same community in the future, but limiting divestiture to instances where a media monopoly existed or, in the court's words, where "cross-ownership clearly harms the public interest." The court reversing, held "precisely the opposite presumption is compelled and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (App. 431).

If the court of appeals' logic were to prevail, then the same logic would support a decision that the search-

ers for truth would be increased in number were newspaper publishers to be prevented altogether from owning broadcast stations in markets outside of their community of publication and broadcasters who engaged in publication of daily newspapers anywhere would then be rendered ineligible for renewal of their licenses. Moreover, the same argument would sustain a ban on newspaper chains by rendering violative of the First Amendment any government benefits, such as postal rates, which enhance or make possible such chains.

The First Amendment is absolute in its protection. Were we to reach the point where the government is to decide who may speak in the name of furthering the First Amendment, we would have reached the point where there is no First Amendment. The court below in its blind pursuit of First Amendment values has overlooked the First Amendment itself, and has reached that point.

Incredible though it may seem, the court has decreed that one who wishes to pursue his right to publish a daily newspaper in a given community, must divest himself of his radio and/or television station(s) in the same community, irrespective of how many print or electronic voices exist within that community or how well he serves the public interest. The conditioning of a right to speak through the medium of print on one's not holding a broadcast license in that community and of the rendering ineligible for broadcast licenses all those who exercise their First Amendment rights by publishing in their community of broadcast, is a denial of equal protection prohibited by the Fifth Amendment. Any discrimination must be closely scrutinized, especially discrimination involving First

Amendment rights.[9] Classifications, in order to be sustained under the Fifth Amendment must rest on a compelling governmental interest.[10] Here there is none. The Commission concluded that while diversity is good, other public interest considerations outweighed the breakup of existing broadcast-print combinations except in situations where media monopolies exist. The evidence before the Commission, which the opinion of the court below reflects, established an absence of abuse of power or position by owners of broadcast stations and co-located newspapers, (App. 403-05), that the newspapers and broadcast stations were separately managed and did not speak the same thoughts (App. 421), and that newspaper owned broadcast stations generally did a better job of serving the public interest than did their competitors (App. 398-99).

The appeals court's determination that universal divestiture is required rests on nothing other than its abhorrence to the subject matter of the speech being communicated through a newspaper and co-owned, co-located broadcast station: once having spoken, the same speaker may not again speak for fear he will say the same thing. As a class, those who possess one voice may not employ another.

While petitioners do not contest the proposition that diversity of media voices is good, that factor should have been considered with other factors—as the Commission did—and not elevated to constitutional or statutory force. The Commission properly weighed all the public interest factors presented to it in favor of and opposed to universal divestiture and concluded that

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[9] *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

[10] *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972).

the other factors outweighed divestiture. This was a policy judgment of a legislative nature entrusted by Congress to the Commission. The Commission's thought process in arriving at its conclusion was clearly set forth in the *Second Report and Order*. Although the court disagreed with the criteria applied by the Commission its analytical process was not faulted by the court below. There was evident far more than the minimum degree of rationality needed for the Commission's determination to be upheld under the Administrative Procedure Act's arbitrary and capricious standard.

In elevating diversity to the constitutional and statutory level that it did, the appeals court was merely groping for a way to justify substitution of its own judgment for that of the Commission. Not surprisingly, nowhere in the Communications Act, or elsewhere, does there appear any specific support for ordering across-the-board divestiture. Moreover, the legislative history of the Communications Act reveals that Congress never enacted a provision prohibiting discrimination against newspaper publishers because it was convinced that the Commission lacked such authority.[11]

In short, nothing—not the facts, not the Constitution, not the Communications Act and not the legislative history—supports the order of divestiture. Nothing but the appeals court's judgment that diversity is presumptively good and therefore compels divestiture, supports its determination. What weight, if any, is to be afforded diversity belongs with the Commission, not the court.

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[11] S. Rep. No. 741, 81st Cong., 1st Sess. 2-3 (1950), H.R. Rep. No. 2426, 82nd Cong., 2nd Sess. 18-19 (1952).

In remanding the proceeding to the Commission "for adoption of a rule not inconsistent with . . ." the court's opinion, all vestige of discretion was removed. The court, in plain English, commanded the Commission to adopt a specific, given rule. It would not be allowed to reconsider. It could not change the criteria under which divestiture would be required or its determination as to future preclusion. All options were foreclosed. In so doing, the court below usurped the Commission's authority and became the administrator of the Communications Act. This was clearly error and contrary to this *Court's* commands in *National Labor Relations Board* v. *Food Store Employees Union,* 417 U.S. 1 (1974), *United States* v. *Saskatchewan Minerals,* 385 U.S. 94 (1966) and *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17 (1952).

ARGUMENT

I

In Determining That Diversity of Media Ownership Is a Factor To Be Afforded Controlling Weight Compelled by the First Amendment and the Communications Act, the Court Below Confused First Amendment Values with the First Amendment Itself

The court of appeals' decision in the broadcast-newspaper cross-ownership case is Act II in its blind pursuit of First Amendment values to the exclusion of the First Amendment itself.[12] Act I was, of course, the same court's determination in *Business Executives' Move for Vietnam Peace* v. *FCC,* 146 U.S. App. D.C. 181, 450 F.2d 642 (1971) where the court reversed the Commission by holding that a fixed policy by a broadcaster of declining editorial advertisements violates

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[12] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 145 (1973) (Stewart, J., concurring).

the First Amendment and remanded in order that the Commission "develop procedures and guidelines for administering a First Amendment right of access." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 97 (1973). This Court reversed. *Id.* at 132.

No one would seriously contest the proposition that diversity of media voices is good and is to be fostered. But it must be pursued consistent with (a) the provisions of the Constitution and (b) other public interest considerations. Should there be sustained the court of appeals' concept of the First Amendment values and public interest considerations as requiring universal divestiture, by logical extension the next steps would be (a) totally banning newspaper owners from any broadcast outlets regardless of proximity (on the theory that they already speak) and (b) the breakup of newspaper chains regardless of the fact that they are operating in consonance with the antitrust, postal, and other laws. If the court can accomplish the colocation ban in the name of the First Amendment and the public interest, it would seem it could accomplish a total ban as between ownership of broadcast and print outlets under a similar rationale. It would need only to wait until such a question reached it. Breakup of newspaper chains would be more difficult for the court below to achieve, but it has heretofore exhibited sufficient imagination and activism to render that, too, possible.

Mr. Justice Stewart's prescient concurrence in *CBS* v. *DNC* outlined what he considered to be "a frightening specter." [13] There is was noted that the First Amendment forbids the imposition of controls on the

[13] *Id.* at 133.

press, that broadcasters are part of the press [14] and that the foregoing notwithstanding the court of appeals held "that the First Amendment *requires* the Government to impose controls upon private broadcasters—in order to preserve First Amendment 'values.'" [15] Unless checked by this Court, the nation is far nearer to realization of the court of appeals' logic that fulfillment of presumed First Amendment and the public interest values requires such control of broadcasters and newspaper publishers as may be necessary, and here requires them to be different entities—an extraordinary control.

II

The Equal Protection Clause Forecloses The Prohibition to a Broadcaster of the Right To Publish and Prevents Publishers From Being Singled Out as Ineligible for Broadcast Licenses in Their Respective Communities

This is not a case where a publisher applicant for a license for a broadcast station is not preferred as against a competing applicant who has no present other voice in the community, or elsewhere. This is a case where the court below has determined that one who has chosen to exercise his First Amendment rights through a co-located print medium is disqualified, without more, from continuing to exercise his broadcasting privilege, and where one who exercises his privilege of broadcasting is foreclosed from exercising his right to publish in the same community. We are here dealing with broad, national classifications where the exercise of one First Amendment right would, in the lower court's

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[14] *Id.*, citing *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

[15] *Id.*

view, be determinative of, and foreclose, the exercise of another First Amendment right. By singling out publishers for disenfranchisement of the opportunity to broadcast, the appeals court has run afoul of action condemned in *Niemotko* v. *Maryland*[16] where a park use permit was denied because of the state's "dislike for or disagreement with the [Jehovahs] Witnesses or their views." There had been abridged "the right to equal protection of the laws, in the exercise of those freedoms of speech and religion. . . ."[17]

The court's underlying rationale is that the two voices might say the same thing whereas the public interest requires, as does the First Amendment, that at least two thoughts be heard when two voices speak. There are two deficiencies to this reasoning. First, the evidence before the Commission firmly established that, on a national pattern, the voices are not controlled by one thought process.[18] Second, even if they were, it would be odd indeed for any court to hold that one having mounted a soap box in Lafayette Square was thereby foreclosed from doing the same on the Washington Monument grounds, permits therefor having been issued. Would this Court sustain a municipal ordinance denying the right to speak in a public forum to one who had, before, spoken on the same issue? The question needs no answer. Yet, that is what the court below has done. In denying publishers the right to speak through the electronic medium, and vice versa, because the two voices might say the same thing the court below has commanded the regulation of the content of speech in its most blatant form.

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[16] 340 U.S. 268 (1951).

[17] *Id.* at 272.

[18] App. 161-62.

It is, of course, true that the electronic medium has physical limitations. Were everyone to speak and no one to listen, chaos would invade the spectrum. It did in the 1920's. Because of limitations on the electronic spectrum, broadcasters irrespective of whether they publish newspapers, must open, as public trustees, their airwaves to contrasting viewpoints. *Red Lion Broadcasting* v. *FCC,* 395 U.S. 367 (1969). The same is not true of publishers, regardless of whether they operate broadcast stations. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). This, notwithstanding the financial difficulty of reaching the same audience as does an established newspaper. *Id.* at 249-50. The right to publish is absolute, unfettered by government's initiative at editorial or other control.

Red Lion established, for all time, that a broadcaster's right to speak over the airwaves is not a right to monopolize them. With this there is no quarrel. Where The Post Company, KNUJ, Inc. and Mickelson Media, Inc. depart from the court below is with the determination that a publisher of a daily newspaper is singled out, as a class of American citizens, to be denied its privilege to broadcast, while observing the Fairness Doctrine, and in all other respects serving the public interest. Deprivation of a privilege in order to exercise a constitutional right was stripped from the law in the 1950's and 1960's.[19] "[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."[20]

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[19] *Sherbert* v. *Verner,* 374 U.S. 398, 404-05 (1963).

[20] *Id.* at 504, citing, *Speiser* v. *Randall,* 357 U.S. 513 (1958). "The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty' its denial may

Should a publisher fail to serve the public interest with his co-located broadcast medium, his license need not be renewed. That, however, is a wholly different proposition from the holding that he is foreclosed from attempting to serve the public interest by reason of his role as a publisher. Moreover, any broadcaster who does in fact serve the public interest through the medium of electronics and who is foreclosed from speaking in print is denied his absolute right under the First Amendment. In either situation, classifications have been drawn, and they rest on no compelling governmental interest.

Police Department v. *Mosley* [21] would seem to be dispositive. Similarly, so would *Reed* v. *Reed* [22] which relied upon a long series of cases to the effect that the Fourteenth Amendment denies to the states "the power to legislate that different treatment be accorded to persons placed by a statute in the different classes on the basis of criteria wholly unrelated to the objectives of that statute." [23]

In *Mosley* the City of Chicago had enacted an ordinance that prohibited picketing within 150 feet of a school unless the school was involved in a labor dispute. Peaceful picketing where the message on the sign related to the subject of a school's labor management dispute was permitted but all other peaceful picketing was

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not infringe speech. . . . [T]he denial of a tax exemption will have the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 518-19.

[21] 408 U.S. 92 (1972).

[22] 404 U.S. 71 (1971).

[23] *Id.* at 75-76.

not. "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter." [24] This was error, for "above all else, the First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." [25] Yet that is what the court below would do.

It is clear that the court below has decreed that speech may be curtailed upon nothing more than its abhorrence to the subject matter: once having spoken, the same speaker may not again speak for fear he will say the same thing. Similarly, as a class, he who has spoken, may not now again speak. Where would we be today had a court ruled that Alexander Hamilton having published FEDERALIST PAPERS number one could not publish others. Where would we be today if a court ruled that WTOP-TV could not have broadcast the same Watergate stories that the *Washington Post* or *Newsweek* published? Where would we be today, if the people of Idaho Falls, Idaho could not hear over KIFI-TV the news of, say, an important city council determination uncovered by the newspaper's reporters? Where would we be today if a proposed school bond issue reported by KNUJ and KNUJ-FM, which happened to be a scoop, could not be reported in the *New Ulm Journal*? What should concern this Court, is that we even have to think about these questions, not how they should be answered. The answers are obvious. It is the questions that are obscure.

It is no answer to say that others besides Alexander Hamilton could have written better FEDERALIST PAPERS,

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[24] 408 U.S. at 95.

[25] *Id.*

it is no answer to say that the Watergate revelations should have been left, in the electronic medium, to those not connected with the *Washington Post,* it is no answer to think that an independent TV station in Idaho Falls might have been able to uncover the same story, it is no answer to say that an independent paper in New Ulm would even have bothered to cover the school bond meeting. What is important is that they cared. It is they who serve the public interest. It is speculation in the most sublime to suggest that others could or would do a better job. No evidence so indicates. Indeed, what evidence there is indicates that newspaper owned stations do a better job of serving the public interest than do their competitors.[26]

III

Diversity of Media Ownership Is But One Public Interest Consideration The Weight Of Which Is a Policy Judgment Entrusted by Congress to the Commission, Not to the Court of Appeals

In the Communications Act of 1934, as amended, Section 309(a) commands the Commission to grant any application for a station license (including a modification or renewal thereof)[27] which it finds to be in the public interest. As this Court noted in *Red Lion* "the Communications Act is not notable for the precision of its substantive standards. . . ." Nevertheless, "the generalized 'public interest' standard in which the Commission ordinarily finds its sole guidance, and which [has been] held a broad but adequate standard

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[26] App. 398-99.

[27] 47 U.S.C. § 308 (1970).

before" [28] is the standard the Commission, not the court of appeals, is to apply.[29]

In the Commission's judgment, the public interest was composed of numerous factors. Diversity of ownership of various media in the same market was an important factor and it weighed in favor of divestiture. However, there were other factors which the Commission considered such as the fact that divestiture could reduce local ownership of media as well as the involvement of owners in the management of the media. In fact, Stations KIFI-TV, Idaho Falls, and KNUJ and KNUJ-FM, New Ulm, are managed by those with substantial ownership interests therein. The court was simply wrong when it found "no evidence was presented [to the Commission] that the local owners of the other stations are actively involved in daily management." (App. 421). The Post Company and KNUJ, Inc. presented evidence that Stations KIFI-TV, KNUJ and KNUJ-FM were managed by their respective corporate presidents.[30] Information on file with the Com-

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[28] *Red Lion Broadcasting Co., Inc.* v. *FCC, supra*, 395 U.S. at 385-86, citing *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); and *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).

[29] *CBS* v. *DNC, supra*, 412 U.S. at 121-22; *Woodby* v. *Immigration and Naturalization Service*, 325 U.S. 276, 282 (1966). A court should no more employ the agency's standard than the agency should employ the reviewing court's standard.

[30] Comments of The Post Company in Opposition to Further Notice of Proposed Rulemaking, dated May 17, 1971; Comments of Mickelson Media, Inc. and KNUJ, Inc. in Opposition to Further Notice of Proposed Rulemaking dated May 17, 1971 in Docket No. 18110.

mission indicated that these corporate presidents owned 16.25% of The Post Company and 18.52% of KNUJ, Inc.[21]

The Commission further considered "the stability and continuity of ownership" as serving "important public purposes." (App. 197). Obviously, substantial investments in the broadcast industry would not be made unless the owners had a reasonable expectation that their licenses would be renewed. Absent these investments, the technological capabilities of the stations would be diminished as would the public interest. The Commission also recognized that many publishers' entrance into broadcasting had not rested upon a profit motive and over the years had established "a long record of service to the public." (App. 197, 198). Moreover, the Commission recognized that divestiture would not necessarily increase diversity, that it would simply tend toward "a mere hoped for gain in diversity. . . ." (App. 198).

Although the relevant factors were considered by the Commission and a rational conclusion drawn, the court below would upset this and impose its own conclusion. Considering the enormity of universal divestiture, any different conclusion would have been virtually impossible to reach. The Commission was clearly dealing with a matter of policy and this was specifically recognized by the court below:

> We summarize the record to the extent necessary to show that in determining its divestiture *policy*, the Commission necessarily had to rely on *policy*, not factual considerations. (App. 396). (Emphasis supplied).

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[21] FCC Forms 323, Ownership Reports.

In order to reach the result it did, the court had to find the Commission's policy determinations to be arbitrary and capricious or otherwise not in accordance with law. This it could do only by substituting its judgment on matters of policy for that of the Commission, which it proceeded to do, thereby "far depart[ing] from the accepted and usual course of judicial proceedings. . . ."[32]

The Administrative Procedure Act in 5 U.S.C. § 706 provides:

> The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or]
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> * * *
>
> (E) unsupported by substantial evidence. . . .

In *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) this Court noted that the foregoing were two of six "separate standards," that an agency determination could be supported by substantial evidence and still be arbitrary and capricious and that "We can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." *Id.* at 290. While paying lip service to this Court's injunction that the scope of review under the arbitrary and capricious standard is a narrow one and that the court is not empowered to substitute its judgment for that of the

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[32] Rule 19(b), Supreme Court Rules.

Commission or review the facts de novo, (App. 934-95), that is precisely what the court below proceeded to do. Under the guise of a "searching" review authorized in *Citizens to Preserve Overton Park* v. *Volpe*[33] the court analyzes on its own much of the evidence adduced before the Commission, recognizes that "there is no guarantee that the prospective ban will increase diversity in all cases" and concludes that the Commission may "assume" that the licensing of a station not affiliated with a local newspaper "offers greater hope of providing the community a new voice" and that the Commission may "incorporate that assessment in its licensing policy." (App. 373-74). The court's language would be more apt were it affirming a Commission determination to require divestiture rather than reversing one not to require divestiture.

Not surprisingly, the court below was unable to find any specific support in the First Amendment or in the Communications Act to support its order of across-the-board divestiture irrespective of the absence of any evidence of harm. The appeals court properly noted that "no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of broadcast stations" and then went on to improperly conclude that no such express authority was essential based upon *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1967). (App. 375). However, *Southwestern Cable* involved a determination of the existence of the Commission's regulatory authority.[34] The case had nothing to do with

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[33] 401 U.S. 402, 416 (1971).

[34] 392 U.S. at 161.

whether the exercise of a policy judgment was arbitrary or capricious.

No one would today argue that the Fairness Doctrine is not constitutional, that robust wide-open debate is not good, that broadcasters are not public trustees or that it is not the right of the viewers and listeners that is paramount.[35] It is, however, a quantum leap from there to the proposition that no matter how well a broadcaster who owns a newspaper has served his community that "the interest of the public is presumed to be in maximum diversification of the airwaves." (App. 417). That leap is the antithesis of the "searching and careful" inquiry a reviewing court is supposed to afford agency action before it on appeal.[36]

The court simply disagreed with the Commission's conclusion not to order divestiture except in monopoly situations. It recognized that "the evidence [did not] point[] strongly one way or another," (App. 414), and that "[d]iversity and its effects are . . . elusive concepts not easily defined let alone measured. . . ." (App. 412). That an elusive, unmeasurable concept is to be the foundation upon which a court would order a restructuring of an industry is the epitome of arbitrary and capricious action. The elevation of this value to statutory and constitutional stature simply defies reason. Absent is "the basic, minimal sort of rationality" [37]

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[35] *CBS* v. *DNC, supra,* 412 U.S. at 111-12, citing *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) and *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367 (1969).

[36] *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 416.

[37] Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 Corn. L. Rev. 375, 391 (1974).

which is the test reviewing courts should apply to the agency decision below. It is not the test upon which the reviewing court's opinion must stand or fall.[38]

This elevation of diversity to constitutional dimension was error as discussed in Section I. It was equally erroneous to award it statutory force. Not only has the court done what Congress has failed to do for over 40 years, the court has done what Congress said the Commission could not do itself. In an excellent Comment on the opinion below, the University of Michigan Law Review will publish "The Power of the FCC to Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification" in late November, 1977. That article graphically illustrates that Congress shelved plans to forbid the Commission from discriminating against newspapers because Congress was convinced that the Commission did not possess that power or authority under existing law to so discriminate. As the Comment points out, in 1947 and 1949 antidiscrimination proposals were introduced in Congress to revise part of the Communications Act. The then acting FCC chairmen testified, respectively, in 1947 that it was Commission practice that newspaper owners were qualified to become licensees and in 1949 that the Commission had no authority to prevent newspaper publishers from becoming licensees.[39] In the Report on the bill, it was said:

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[38] *Cf., Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 282 (1966) (discussing substantial evidence).

[39] *Hearings on S. 1333 Before the Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 44 (1947); *Hearings on S. 1973 Before the Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 103-04 (1949).

> It should be distinctly understood that in eliminating the [antidiscrimination] section the Committee has done so solely because the Commission is now following the procedure that was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure. S. Rep. No. 741, 81st Cong., 1st Sess. 2-3 (1950).

The House included an antidiscrimination provision and when the bill went to conference, the newspaper amendment was deleted because the conference committee concluded it was unnecessary:

> under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in or association with a newspaper or other medium for gathering or disseminating information. H.R. Rep. No. 2426, 82nd Cong., 2nd Sess. 18-19 (1952).

In *Chemehuevi Tribe of Indians* v. *Federal Power Commission*[40] this Court noted that deferrence due long standing administrative construction of a statute is enhanced when Congress has given no indication of its dissatisfaction with the agency's interpretation over the years, especially when the statute has been amended in various respects.[41] Surely Congress' failure to prohibit discrimination against publishers is signifi..atly enhanced when Congress is on record as believing the Commission lacked the power to discrimi-

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[40] 420 U.S. 395 (1975).

[41] *Id.* at 410.

nate under existing law. In any event, certainly Congress' failure to affirmatively prohibit newspaper-broadcast cross-ownership strips diversity from being the controlling factor in the "public interest," a category to which the court below attributes it. Without this cloak the argument of the court below is reduced to a shambles.

IV

The Court of Appeals' Direction to the Commission to Enlarge the Required Divestiture Was Improper without Affording the Commission The Opportunity to Reconsider

When the court "remand[ed] the record to the Commission *for adoption of a rule* not inconsistent with this opinion," (App. 431),[42] it usurped the administrative function and commanded, irrespective of all other considerations, and absent waiver, universal divestiture. The court of appeals became a rulemaker. Such action flies in the face of numerous cases to the contrary where this Court has reversed in its supervisory capacity.

In commanding adoption of a new rule not inconsistent with its opinion, the court removed all vestige of discretion from the administrative agency. Not only did the court hold that the Commission's distinction between existing newspaper-broadcast combinations and future ones may not be sustained, it also disagreed with the Commission's drawing of the line between requiring divestiture in egregious cases constituting a local media monopoly and in all other cases. Assuming *arguendo* that the Commission possesses the power to classify newspaper publishers as ineligible for future licenses, a proposition with which The Post Company, KNUJ, Inc. and Mickelson Media, Inc. do not agree,

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[42] Emphasis supplied.

there remains the question as to whether the Commission's distinction between a monopoly situation and non-monopoly situations was valid. "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."[43] Having answered that question—either way—the appeals court should have remanded the case to the Commission for its further consideration of whether to continue, delete or modify the distinction it had drawn and whether divestiture was to be required of existing combinations. On reconsideration the Commission, if given a free hand, could do away with any distinctions vis-a-vis existing combinations or it could change its criteria as to when divestiture in existing situations is required. These courses of action are now foreclosed by the court's directive remand.

The law is clear that the court below usurped the Commission's authority. In *National Labor Relations Board* v. *Food Store Employees Union,* 417 U.S. 1 (1974), the court of appeals enforced an NLRB order but remanded to the Board for further consideration of additional remedies.[44] On remand, the NLRB amended its order to encompass certain supplemental remedies but refused to order the employer to pay the union's litigation expenses and excess organizational costs.[45] Thereafter, in another case, the Board ordered reimbursement of litigation expenses incurred when an employer had engaged in frivolous litigation. In

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[43] *Police Department* v. *Mosley,* 408 U.S. at 95.

[44] 433 F.2d 541 (1970).

[45] 191 NLRB 886 (1971).

view of this intervening NLRB decision, the court of appeals in the *Food Store Employees* case enlarged the NLRB's order to require the employer to pay the union's litigation and excess organizational costs.[46] On certiorari, this Court reversed insofar as the judgment enlarged the NLRB order and remanded with directions that the case be remanded to the Board for further proceedings. This Court unanimously held that notwithstanding facial inconsistencies between the intervening NLRB decision and its decision in the *Food Store Employees* case, it was reasonable that the Board could plausibly reconcile the seeming inconsistency, and therefore it was improper for the court of appeals to enlarge the NLRB order without first affording the Board the opportunity to clarify any inconsistency. 417 U.S. at 9-11.

In *United States* v. *Saskatchewan Minerals*[47] a three-judge district court set aside an order of the Interstate Commerce Commission and remanded the case "for further proceedings with instructions to grant relief" to the appellee "in accordance with the opinion heretofore entered by this court. . . ."[48] In *Saskatchewan Minerals,* this Court agreed that the foregoing "restriction [was] an improper limitation on the Commission's duty to reconsider the entire case."[49] In *FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952) this Court corrected a similar usurpation: "On remand the Commission might have reissued the order without the con-

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[46] 476 F.2d 546 (1973).

[47] 385 U.S. 94 (1966).

[48] *Id.*

[49] *Id.* at 95, citing *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P.R. Co.,* 379 U.S. 642 (1965).

tested conditions or might have withheld its consent to any license. It is the Commission's judgment on which Congress has placed its reliance for control of licenses." So too, it is on the FCC, not the court of appeals, that Congress has placed its reliance for determining and furthering the public interest.

CONCLUSION

For the reasons stated above, the opinion below should be reversed.

Respectfully submitted,

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ADDENDUM

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 308

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours

of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title. June 19, 1934, c. 652, Title III, § 308, 48 Stat. 1084; July 16, 1952, c. 879, § 6, 66 Stat. 714; Apr. 27, 1962, Pub.L. 87-444, § 3, 76 Stat. 63.

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